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PRACTICAL GUIDE

for challenging trial waiver systems in Albania

Fair Trials International

Fair Trials is an international NGO that promotes fair and equal criminal justice systems

Res Publica Centre

Res Publica is an Albanian NGO that promotes and protects human rights through litigation, education and advocacy

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INTRODUCTION

Life in modern societies is particularly complex and requires the legal – including by means of criminal law- regulation of an increasing number of everyday activities. The significant increase of acts and activities that can be the object of criminal proceedings together with the emergence of new and complicated forms of criminality and the concomitant need to combat them effectively have posed a challenge to prosecutorial and judicial authorities which, flooded with cases, have to strike a balance between respecting well-established criminal procedure safeguards while disposing of these cases as swiftly as possibly. As a result, and in what would be considered as going against the very notion of justice not that long ago, an ever increasing number of defendants around the world have their cases reviewed not by a court but disposed of following an agreement between them and the prosecutor or the judge, an agreement under which they agree to waive some of their procedural rights in return for a swifter judgment and a sentence reduction.

According to the leading international NGO on criminal defence rights Fair Trials International, such practices constitute in essence a waiver of one's right to a full-blown trial. Such "trial waivers" and can be defined as processes: "… not prohibited by law under which criminal defendants agree to accept guilt and / or cooperate with the investigative authority in exchange for some benefit from the state, most commonly in the form of reduced charges and / or lower sentences."[1]

The term "trial waiver" is a generic one as such systems have been adopted under a variety of names, ranging from rather familiar from U.S. T.V. courtroom dramas "plea-bargains" to the more unknown "summary / abbreviated trial" that at least, if only in name, evoke to mind a proper trial. Nevertheless, and regardless of their name, what these systems have in common is precisely an element of a bargain, a negotiation between a judicial officer (more often than not the prosecutor) and the defendant, whereby the latter renounces one of his / her criminal procedural rights or pleads guilty in return for the former to either drop some of the charges or reduce the sentence to be imposed.

1 Fair Trials International, The Disappearing Trial: Towards a rights-based approach to trial waiver systems, at page 2.

The main reason behind the ever-increasing popularity of trial waiver systems is precisely the fact that, if implemented properly, both sides stand to benefit. Thus the prosecuting authorities and the courts can quickly remove from their backlogs cases that would otherwise take up valuable but limited police and judicial resources (and even, in the cases of collaborators of justice, allow them to conduct more effective investigations by providing an incentive to defendants to provide incriminating information on their former accomplices), whereas the defendants can reasonably know beforehand what their sentence will be, benefit from a sentence reduction, avoid lengthy pre-trial detention and not incur considerable legal costs and expenses. As a result, trial waivers are too appealing, to courts and defendants alike, and can be expected to remain a key feature of most, if not all, legal systems.

Yet at the same time, it cannot be denied that the very notion of negotiated justice on which trial waiver mechanisms are based, seems to run counter to traditional concepts as to how courts should administer justice; after all, one would expect that the guilty should be held fully accountable for their crimes, not strike deals with the prosecutors with a view to receiving lower sentences. It is difficult to disagree, with United States' Supreme Court Justice Kennedy's observation to the effect that the (U.S.) present-day criminal justice system, in which guilty pleas accounted for 95% of all criminal convictions in 2009, is not based on trials but on indirectly forced guilty pleas and revolves around "horse trading" between the prosecution and the defendant.[2]

And to make matters worse, in 2016 44.5% of the exonerations in the U.S. concerned defendants who had pled guilty following a plea agreement[3] strongly suggests that innocent defendants might be forced (indeed, one could say coerced) to plead guilty in order to avoid a trial with an uncertain (but if found guilty, definitely worse) outcome.

Turning to the Albanian legal order, there are currently five special procedures aimed at shortening criminal proceedings, provided in and regulated under either the Criminal Procedure Code (CPC) or Code of Criminal Justice for Children (Criminal Code for Minors). Two of them, namely the direct trial and the penal order, can be initiated only by the prosecutor and his / her discretion;[4] the other three (namely the abbreviated trial, the judgment upon agreement and the diversion from criminal prosecution for minors) require the defendant's consent and hence can be considered as "pure" trial waiver procedures. The present guide will place emphasis on abbreviated trials (which are initiated exclusively by the defendant before the preliminary hearing judge and do not require an admission of guilty) and judgments upon agreement (which can be proposed by the prosecutor and require the defendant's confession), as they constitute by far the most prevalent trial waiver mechanisms in the Albanian legal order.

2 US Supreme Court, Missouri v. Frye, 566 U.S. 134, 2012, available in English at: https://supreme.justia.com/cases/federal/us/566/134/ In his reference to "horse-trading", Justice Kennedy was quoting verbatim from an 1992 scholarly article on plea agreements: see Robers E. Scott and William J. Stuntz, Plea-Barganing as a Social Contract, 101 Yale L.J. 1909 (1992), at 1912.

3 Fair Trials International Submission to the UN Office of the High Commissioner for Human Rights report on the implementation of the UNGASS Outcome document on the world drug problem, in regard to human rights, May 2018, page 4.

4 It should also be noted that when informed of the launching of direct trial proceedings against him /her or when challenging a penalty order issued against him / her, the defendant has the right to request an abbreviated trial.

Thus although comprehensive statistical information is not available, on the basis of information collated from various sources as well as responses to requests for information filed with the Prosecutor's Office attached to the First Instance Court of Tirana – the capital city of Albania-, out of the 3,092 cases that were committed to trial in 2019, the defendants in 2,450 cases (and concerning 2,824 defendants) filed a request for abbreviated trial.[5] According to the same source and during the same year (2019), 150 judgments upon agreement (20,4% of the total).[6] In other words, in almost 80% of the criminal cases registered that year by the Tirana Prosecutor's Office, the defendants requested an abbreviated trial. Interestingly enough, according to a 2019 study by Res Publica, out of the 2,999 cases before the Tirana District Court that could potentially be the object of a judgment upon agreement (i.e. cases regarding offences carrying a maximum prison sentence of seven years) in 2018, such a judgment was adopted in relation to only 359 cases, i.e. 12% of the potential cases.[7] In other words, the number of judgments upon agreement entered into in the jurisdiction of the Tirana District Court was more than halved from 2018 to 2019, even though there is evidence to the effect that such agreements are advantageous for defendants, as on average the sentence imposed in the context of judgments of agreement is on average 15% lower that than imposed in proceedings tried under the ordinary procedure where the defendants faced identical charges.[8]

The current guide contains three parts. In the first part, an overview of the domestic legal framework and information on the current state of play on issues regarding access to a lawyer, access to a case file and equality of arms in the context of abbreviated trials and judgments upon agreement will be presented.

The second part will contain a series of suggestions, including potential legal arguments, as to the litigation-based strategies that can be employed with a view to tilting the negotiation table in favour of the defendant and ensuring that his / her consent to a trial waiver is as free and as informed as possible – or, to continue along the lines of the horse-trading metaphor above, that at the price of waiving some of his / her rights, the defendant buys a horse and not a donkey.

The third and last part will set out a number of recommendations to relevant domestic stakeholders with a view to amending the legislative and regulatory framework and ensuring a more equitable bargain between the judicial authorities and the defendants. In so doing, the authors of the present guide acknowledge that whatever their numerous shortcomings, the various trial waivers mechanisms will continue to constitute a central plank of the Albanian criminal justice system, if only because, as observed by an Albanian prosecutor who took part in the experience-sharing event organised in the context of the present research project in June 2021, "if the trial waivers were abolished, the criminal justice system would collapse the very next day".[9]

5 Tirana First Instance Prosecutor's Office letters ref. nos. 71/Q and 4421/a, dated 5/2/2020 and 22/4/2020, respectively.

6 Tirana First Instance Prosecutor's Office letters ref. nos. 71/Q, dated 5/2/2020.

7 Judgments upon Agreement, Res Publica Centre, 2019, available in Albanian at: http://www.respublica.org.al/wp-content/uploads/2021/10/marreveshjet-e-fajesise-2019-web.pdf page 35.

8 Ibid, page. 41.

9 Quote by participant S.Q. (the initials have been changed for data protection purposes), Experience-sharing event, held on 25 June 2021, in Tirana, Albania.

PART A: DOMESTIC LAW AND CURRENT STATE OF PLAY

1. Access to a lawyer

Domestic law

Article 28 of the Albanian Constitution provides that everyone who has been deprived of his / her liberty shall have, among other rights, the right to communicate immediately with a lawyer, while Article 31(ç) provides that everyone has the right to be defended with the assistance of a defense lawyer during a criminal proceeding.

Under the Criminal Procedure Code (hereinafter CPC), the exact legal basis for the right to a lawyer (be it privately retained or state-appointed) depends on the status of the suspect / accused at the time of the questioning. Although in general suspects / accused in liberty enjoy almost the same right to a lawyer with persons detained / arrested, a significant difference is that suspect / accused persons at liberty are not entitled to a confidential meeting with their lawyer before being questioned for the first time, as is the case in relation to suspect / accused persons who are detained or arrested; in such cases, the arrested / detained person has the right to consult with his / her defense lawyer immediately after the arrest and before being questioned by the police , the appointment of a lawyer (privately retained or state-appointed) is mandatory. The right to a lawyer is also mentioned in the Letter of Rights handed over to the prior to his / her questioning for the first time. The suspect / accused (regardless of whether he / she has been deprived of his / her liberty) shall be asked if he / she was understood his / her rights (including that of the right to a lawyer) provided in the Letter of Rights; statements made before the suspect / accused has been informed of his / her rights, are not admissible.

The CPC also contains a number of additional safeguards aimed at ensuring that a suspect / accused will be able to benefit for legal assistance. Thus the questioning before the prosecutor should take place in the presence of the privately retained or state-appointed lawyer. Similarly, a defendant who is abroad and his extradition has been denied, can be questioned over audio-visual link, provided that the law of the State in which he / she is ensures the presence of the defendant's lawyer in the venue of questioning while identity parades are to be held in the presence of the defense lawyer.

Following the conclusion of the investigation by the prosecutor and the filing of a request, addressed to the court to commit the case to trial, the court should review if the defendant has appointed a lawyer; if not, the court shall assign a state-appointed one as the presence of a defense lawyer is mandatory. Similarly, the court reviewing the lawfulness of the arrested / detained person's arrest and detention should ensure the presence of the defense lawyer; should he / she not show up, then the court will assign a state-appointed one as the presence of a defense lawyer is mandatory.

The above provisions are also applicable in cases where persons appearing before a proceeding authority and without having yet acquired the status of the defendant, make self-incriminating statements. The investigating official should then terminate the questioning and inform them that criminal proceedings can be launched again them as well as advise them that they should appoint a lawyer. Statements made previously by such persons cannot be used against him / her.

Turning more specifically to procedural rights in the context of trial waiver procedures, defendants who seek to request either a judgment upon agreement, an abbreviated trial or (in case of minors) diversion from criminal prosecution and the imposition of alternative measures, enjoy all the corresponding rights available to all defendants until the moment when they express their intention to benefit from one of the trial waiver mechanisms.

Regarding the presence of lawyer in the context of trial waiver procedures, it is recalled that such negotiations effectively take place only in the context of judgments upon agreement and alternative measures for minors; regarding abbreviated trials, the right to request one rests solely with the defendant. In both such cases (i.e. judgments upon agreement and alternative measures for minors), the presence of defence counsel is mandatory and cannot be waived (Article 406/d (2) CPC, Article 49(1) (e) CPC, Article 48(4), 59(3),(4) Criminal Code for Minors). There is no equivalent provision for defendants who seek an abbreviated trial; nevertheless as under Article 331 CPC defendants appearing before the preliminary hearing judge are entitled to mandatory legal assistance, and considering that under Article 403(1) of CPC requests for an abbreviated trial can be filed only with said judge, in practice and by virtue of the generally applicable legal provisions, even defendants who are contemplating requesting an abbreviated trial will be represented by lawyer.

State of play - problems identified

According to various legal professionals consulted officially and unofficially for the purposes of the present study, there is no evidence that police / prosecutors apply direct pressure on defendants or their lawyers in order to request one of the trial waiver procedures referred to above. That said, certain features of the Albanian criminal justice system might be considered as having a significant impact on the defendants' decision as to whether to request either an abbreviated trial or a judgment upon agreement.

A particular problem identified with abbreviated trials identified in the context of the present study concerns the modalities under which such requests are filed. According to practising lawyers consulted for the purposes of this guide, the climate at the chambers of the judge holding the preliminary hearing following the conclusion of the criminal investigation by the prosecutor, is rather tense. It is noted that following the amendment of the CPC in 2017, it is now at this stage

that the defendant has to file a request for an abbreviated trial (Article 403(1) CPC). Often the preliminary hearing judge will open the discussion by asking the defendant and his / her lawyer whether they want an abbreviated trial. Lawyers claimed that a negative answer to that question, together with requests for the gathering of additional evidence not gathered by the prosecutor (and especially potentially exculpatory evidence) often elicits a visible frown by the judge who is more like that not to reject any requests for additional evidence, noting that the case file is complete, and reiterate his / her question whether the defendant wants to request an abbreviated trial. At this point, the defendant has to make an almost split-second decision. Either he / she relents and requests an abbreviated trial or answers that he / she prefers a trial under the ordinary procedure. In the latter case, the defendant therefore has both lost the possibility of reducing one third off his / her eventual sentence and has not managed to secure the gathering of additional evidence at that time – an important consideration if the information is time-sensitive.

As the above were not enough, the defendant who requests a trial under the ordinary procedure can hardly have any reason to believe that he /she stands a fair chance of being acquitted by the court. As noted above, 80% of the cases at the Tirana District (First Instance) Court were disposed of under the abbreviated trial procedure. Considering that in such proceedings the defendant does not admit his / her guilt, it would stand to reason that a considerable number of these cases should end up with the defendant's acquittal. Nevertheless, on the basis of an analysis of the available statistics of the Tirana District (First Instance) Court carried out by the overall acquittal rate for that Court in 2020 was 2,9%; moreover, although there is no evidence as to the percentage of first instance judgments upheld / overturned on appeal, anecdotal evidence suggests that it is also very low. The above suggest that a request for an abbreviated trial is perceived by judges as an implicit admission of guilt (hence the rather low number of acquittals), leading to a rather unenviable dilemma that he / she has to resolve in minutes, at the preliminary hearing judge's chambers and in the presence of the prosecutor: either the defendant requests an abbreviated trial, waiving his / her rights, knowing that more likely than not he / she will be found guilty but will at least benefit from an one third reduction of his / her sentence and will be seen as "cooperative" in the eyes of the prosecutor and the court, thus increasing the chances of a lower sentence, or he / she will not request an abbreviated trial and thus can exercise all his / her procedural rights but knowing that the judge more likely than not will not request the gathering of additional evidence, that he / she will be considering as "uncooperative" by the prosecutor, the preliminary hearing judge and ultimately the court, without enjoying any greater chances of an acquittal, given the very low acquittal rate.

In the light of the above, it can be seen why regardless of their legal skills and professional experience, and regardless also of the nature of the offence / the defendant's personal circumstances (e.g. if he / she belongs to a vulnerable group) both state-appointed as well as privately retained lawyers are more likely than note to recommend to their principals to request an abbreviated trial: by requesting one, defendants have much to gain and little to lose and their lawyers would be acting unprofessionally if they did not point the above out to their principals. Indeed, in a rather small sample of 100 cases with comparable charges evenly split between cases where the defendant was represented

by state-appointed and privately retained lawyer, it transpired that in 49 of the 50 former cases and in 45 of the 50 latter cases, the defendants requested an abbreviated trial.[10] This pattern is also attested to by previous research carried out by the NGO Res Publica: on the basis of a comparison between 50 cases where the defendant(s) was represented by an ex officio lawyer and 50 comparable cases where the defendant(s) was represented by a privately retained lawyer, legal aid lawyers would request the holding of an abbreviated trial in 98% of the cases whereas the privately retained lawyers in 90% of the cases.[11]

Turning to judgments upon agreement, no similar concerns are identified. Indeed, the fact that the number of requests for judgments upon agreement is rather low (and is decreasing) seem to confirm the finding that defendants are not pressured in requesting a judgment upon agreement. Moreover, most judgments upon agreement seem to be particularly advantageous for the defendants involved: on the basis of a survey by Res Publica on the basis of a sample consisting of 100 cases (50 tried under the ordinary trial procedure and 50 concluded by means of a judgment upon agreement), the sentence imposed in the context of judgments upon agreement was found to be on average 15% lower that than imposed in proceedings tried under the ordinary procedure where the defendants faced identical charges; in fact, in some cases, the sentences agreed between the prosecutor and the defendant were 65% to 70% lower than the ones netted out by the court in the context of an ordinary trial. Rather tellingly however, regarding offences such as insurance fraud and failure to obey a police order, the prosecutors in fact requested and the courts granted a 15% and 85% higher sentence respectively than the one imposed by courts regarding the same offences but tried under the ordinary trial procedure. This clearly shows that while prosecutors in general hold their end of the bargain and are willing to compromise as to the length of the sentence, there is an administrative practice as to which offences can benefit from a sentence reduction in the context of judgments upon agreement,[12] with the prosecutors deciding (and the courts endorsing their decision) as to which offences.

Regarding the role of lawyers in the context of judgments upon agreement, previous research carried out by Res Publica suggests that state-appointed lawyer seem to fare significantly better in ensuring favourable plea agreements for their clients than privately retained lawyers; thus in some cases and for the same offences, state-appointed lawyers managed to secure for their principals a sentence following a judgment upon agreement that was 40% lower than that secured by privately retained lawyers – indeed, in relation to only one of the offences studied (theft) was this phenomenon not observed, with the sentences secured by privately retained lawyers being three times lower than those secured by state-appointed ones.[13] Moreover, it also appears that some state-appointed lawyers (who are in fact appointed by the prosecutor) are more likely than not to be assigned to represent defendants; out of 162 cases in which a total of 46 state-appointed lawyers were appointed by the prosecutor to represented the defendants, three lawyers were

10 Judgments upon Agreement, Res Publica Centre, 2019, op.cit., page 7.

11 Effectiveness of Legal Aid in Criminal Proceedings in Albania: How Far Are We From International Standards?, (English version) Res Publica Centre, 2016, page 113.

12 Judgments upon Agreement, Res Publica Centre, 2019, op.cit. page 41.

13 Judgments upon Agreement, Res Publica Centre, 2019, op.cit, page 40.

appointed in 35% of the cases.[14] These two elements combined (namely the fact that state-appointed lawyers seem to be doing a better job in securing better plea agreements and that some state-appointed lawyers are more likely to be appointed by prosecutors) could be an indication that prosecutors informally "persuade" defendants to not appoint a privately retained lawyer but accept to be represented by the state-appointed one that will be appointed by the prosecutor, in order to benefit from a better plea agreement, as also observed in Georgia following the institution of plea-bargain proceedings.[15] That said, it should be noted in this respect that in November 2019, the newly established High Prosecutorial Council adopted a regulation regarding the appointment of legal aid lawyers; it is believed that the new system of appointment, based on rotation, will limit the prosecutors' discretion in appointing legal aid lawyers.

14 Ibid, page. 42.

15 Transparency International, Plea Bargaining in Georgia: Negotiated Justice, 2010, at page 17.

Good practice

In Italy, even if the request for an abbreviated trial is rejected by the preliminary hearing judge, the defendant can still request an ordinary abbreviated trial before either the preliminary hearing judge prior to the filing of the conclusions by the parties (Article 438(6) of the Code of Criminal Procedure) or the trial judge (following the interpretation adopted by the Italian Constitutional Court in its judgment no. 127/2021). This in turn means that both the defendant and his / her legal counsel have more time at their disposal to devise a proper defense strategy.

In England and Wales, the guidelines adopted by the Sentencing Council provide that the earlier the defendant enters a guilty plea, the more significant the sentence discount to be given out of a range of already specified sentence reductions. Thus should a defendant enter such a plea at the first stage of proceedings, they would benefit from a one-third reduction of the sentence – the maximum discount that can be granted. Should he / she enter such a plea at a second hearing, then a one-quarter sentence reduction will be granted. Last, should he / she decide to plead guilty at the first day of the trial on the merits, then the maximum sentence reduction to be granted is one-tenth. It is important to point out that the application of these rules is not automatic but subject to exceptions: thus should the court consider that it was objectively impossible for the defendant to enter a guilty plea any sooner than he / she actually did, then he / she would still be entitled to a one-third reduction (Sentencing Council, *Reduction in Sentence for a guilty plea guideline*, March 2017). As in the case of Italy, defendants and their lawyers have more opportunities to enter a guilty plea, meaning they have more time at their disposal to review the case file and gather exculpatory evidence.

2. Access to the case file

Domestic law

There are no particular disclosure requirements regarding any form of trial waiver and thus the general legal framework is applicable. Suspects / defendants are informed of the charges upon arrest but usually not but not of the reasons that necessitated their arrest (as opposed to any other measure). This is because police have adopted a selective interpretation of the relevant Article, Article 34/b, of the CPC. And while it is true that Article 34/b paragraph 1 letter b) of the CPC provides that the arrested or the detained person has the right to be informed only of the acts, necessary evidence and reasons for his / her arrest or detention, by means of Article 34/b paragraph 1 such a person is also entitled to be informed, in the shortest possible time, of the charges as well as the grounds of the charges against him / her; indeed, this right is also referred to in Point 1 of the Letter of Rights.

Regarding abbreviated trials, the defendant has the right to access the case file for the first time after the conclusion of the investigation and before the prosecutor decides whether to dismiss the case or commit it to trial (Article 327(3),(6) CPC). Regarding judgments upon agreement, the relevant provisions do not contain any specific entitlement (or prohibition) in that respect. It would therefore appear that under the general provision concerning access to the case file (Article 327(3) CPC), the defendant (and his lawyer) will be allowed to access the case file after the conclusion of the investigation and before the prosecutor decides whether to dismiss or request the court to commit the case to trial.

State of play - problems identified

According to a lawyer consulted for the purposes of this study, the problems that lawyers in trial waiver proceedings face are the same structural problems that all criminal lawyers face, such as namely the fact that often prosecutors' offices do not allow lawyers timely access to the case files or do not allow access to it on various pretexts, thus forcing lawyers to either study the case file on the spot of merely get photos with their phones of the most relevant documents of the case file.

Good practice:

In Luxembourg, where a specific provision permits defendants who indicate interest in a trial waiver (known as "jugement sur accord") to be granted access to the full criminal file held by prosecuting authorities. Finland provides for full disclosure prior to trial waivers. as well. In other jurisdictions, although there is no disclosure provisions specific to trial waiver systems, general disclosure regimes provide defendants with sufficient access to evidence in time to make decisions about trial waivers, as it is the case in Germany or Spain, where in any case defendants receive a copy of all evidence intended to be used at trial before they are asked to make a decision to waive their right to a full trial (Fair Trials International, *The Disappearing Trial*, op. cit., page 52).

3. Equality of arms in the investigation state of proceedings

Domestic law

During the preliminary investigation phase and before being called to decide on whether they will request a trial waiver, defendants are afforded the criminal procedural rights foreseen under the general part of the CPC. Thus following the conclusion of the criminal investigation, the defendant will be informed accordingly and will be afforded a period of ten days in which he / she can submit additional information, request that follow-up investigation measures are undertaken, or ask to be questioned (Article 327(4) CPC). Any decision by the prosecutor to turn down a request for the collection of additional information should be reasoned and issued within fifteen days (Article 327(4), Article 110(2) CPC).

Following the filing of a request for an abbreviated trial, defendants are precluded from requesting the gathering or / adducing any evidence or information regarding the circumstances of the crime, including any exculpatory evidence. They can, however, adduce information about their character and other circumstances that they believe might cast him / her in a more favorable light and lead the court to further reduce their sentence, as such information is not considered as new or additional information for the purposes of the trial, as it does not relate to the circumstances in which the crime was committed. Similarly, the court can address questions to the defendant regarding his / her personal, family or financial situation (Article 405(7) CPC).

Concerning judgments upon agreement, as the request for one can be filed at any time from the launching of the criminal proceedings until the preliminary hearing before the judge, requests for collection of additional evidence can be filed under the basis of the generally applicable legal provisions. Any exculpatory or other evidence should be presented at the prosecutor and be used as a bargaining chip in order to secure a better offer for an agreement by the prosecutor. While the defendants will be heard by the court, the latter will not review the case but merely ensure whether the basic qualification criteria for endorsing the judgment upon agreement are met. Said criteria are both procedural (e.g. whether the defendant's consent is informed or whether he / she understands the terms of the agreement) (Article 406(dh) CPC) and substantive (e.g. whether the evidence included in the case file could not serve as a prima face basis for the defendant's conviction or whether the punishment was inappropriate in light of the nature of the offence and the personality of the defendant; Article 406/ë (1)(d) and (e)) CPC respectively.

State of play - problems identified

Perhaps the biggest such shortcoming is the passive role of the defense counsel during the investigation phase of the proceedings. It would seem that his / her role is merely to observe that the prosecutor is doing his / her job properly, rather than working towards establishing the innocence of his / her client. Prosecutors however tend to focus on collecting incriminating evidence, rather than exculpatory one.

To a large extent, the lawyer's passive role is a result of the legal framework and its deficient implementation in practice. Thus while defense lawyers have a right to request from the prosecutor to collect additional evidence, the prosecutor does not have a corresponding obligation to grant such requests; it is only when the defendant requests to be questioned that the legal framework explicitly recognizes an obligation on the part of the prosecutor to grant it (Article 327(4) CPC). Admittedly, any rejection of a request by the defendant for the collection of additional information ought to be reasoned and any such rejection decision

with inadequate reasoning could be invoked as an argument before the court as evidence of the ineffective investigation against the defendant; in practice however, prosecutors simply ignore such requests. Moreover, should the defendant decide to request one of the two main trial waiver processes, he / she will not be able to invoke as an argument the prosecutor's unreasoned decision – should one exist – turning down the request for the gathering of additional evidence as he / she will have waived the right to do so.

As a result of the above, and in light of the extremely low acquittal rate (2,9% for all misdemeanors and felonies in the judicial district of Tirana), it appears that the case files contain almost exclusively incriminating evidence. And while this might not necessarily pose an issue regarding judgments upon agreement in so far as there are mechanisms in place to review whether a guilty verdict is supported by evidence in the case file (though see below), the statistically impossibly low acquittal rate regarding abbreviated trials can only suggest that in practice, a request for an abbreviated trial is perceived as an implicit admission of guilt on the part of the defendant, a perception which together with the lack of any exculpatory evidence in the case file can only lead to a guilty verdict. Furthermore, evidence suggests that when reviewing cases under the abbreviated trial procedure, courts do not adequately scrutinize even material included in the case file, material that could reasonably lead one to form the impression that the criminal investigation was not particularly thorough. A phenomenon which was reportedly taking place in the south of Albania in 2008 was that elderly people in the homes of which significant quantities of drugs were found, would readily request an abbreviated trial and even readily confess (it is recalled that the judgment upon agreement institution had not been introduced in the Albanian legal order yet) that the seized drugs belonged to them. This would be enough for the prosecutor to suspend investigation into potential accomplices as the "culprit" had been found. These elderly drug "kingpins" would then benefit from a one-third reduction of their sentence and would most probably be sentenced to a suspended prison term due to their advanced age. While it is difficult if not impossible to ascertain to which extent such practices take place today, it is submitted that in at least some cases the defendant requesting an abbreviated trial is effectively the designated fall-person. By way of example, a lawyer consulted for the present guide reported that in a case of electricity theft committed by the husband, the wife acknowledged her "guilt" and asked for an abbreviated trial, hoping that as a woman the court could be more lenient towards her and in addition to the one-third reduction, would lower her sentence even more. The prosecutor did not pursue the investigation further and in a court hearing that lasted literally one minute, she was found guilty of electricity theft and sentenced to a rather light suspended sentence.

Turning to judgments upon agreement, the relevant legal provisions explicitly provide that the court, when reviewing the proposed agreement, should assess among other elements whether the case file contains evidence attesting to the defendant's culpability. In practice however, it seems that courts do not subject proposed judgments upon agreement to very strict scrutiny; out of a sample of 460 cases for which the prosecutor filed with a court a request for approving a judgment upon agreement, in only 12% of these cases was the request rejected by the court, the main grounds for rejection concerning not the prosecutor's decision making-process or any abuse of his position but his failure to e.g. check whether the judgment upon agreement procedure was applicable to the offence in question, or whether the defendant's consent to enter into such an agreement was unequivocal. No cases where the court rejected the proposed agreement because (grounds for rejecting a proposed judgment upon agreement provided for under Article 406/ë (1)(d) and (e)) were identified.[16]

16 Ibid, pages 38-29.

Part of the reluctance of courts to subject judgments upon agreement to strict scrutiny might be the very nature of the offences that are usually the object of such proceedings. According to a serving judge consulted for the purposes of this study, judgments upon agreement are mostly entered in cases that present a low to moderate social risk, such as driving under the influence, electricity theft and illegal construction. This observation is borne out by research previously undertaken by the NGO Res Publica, which found that in 2019 and 4 four months in 2020, 18% and 17% of cases of illegal and electricity theft (166) construction (144) respectively the proceedings were concluded by means of a judgment agreement, while the relevant percentage in offences such as falsification of seals / stamps (1 out of 62), domestic abuse (7 out of 354) and harassment (1 out of 58) was less than 2%.[17] Since these offences are on the lower end of the criminality spectrum, together with the fact that as seen, in most cases prosecutors tend to be rather magnanimous in the sentence reduction they offer, seem to make judges think that overall the proposed agreement is particularly beneficial to the defendant and hence do not review it more closely.

17 Judgments upon Agreement, Res Publica Centre, 2019, available in Albanian, page 33.

Good practice

In Italy, Article 438(5) of the Code of Criminal Procedure allows defendants to condition their request for an abbreviated trial to the gathering of new evidence. The request is reviewed by the preliminary hearing judge who must issue a reasoned decision as to whether the evidence request is necessary or not. This strengthens the defendant's position in the context of abbreviated trial proceedings and ensures judicial oversight over the prosecutor. It should be noted that the defendant is afforded numerous opportunities to present requests for abbreviated trial. Thus he / she can file an conditional request for an abbreviated trial together with an ordinary request for an abbreviated trial (Article 438(5) bis of the Code of Criminal Procedure); that way, should the former be rejected, the defendant has still secured the benefits deriving from the application of an abbreviated trial.

In Germany, the Law on Agreements in Criminal Proceedings, as interpreted following a judgment by the German Supreme Court in Criminal Matters (BGHSt 50, 40-64, 3 March 2005), provides that self-incriminatory statements issued in the context of plea agreements must be sufficiently detailed and concrete and based on evidence included in the case file. This means that confessions not supported by a minimum of evidence cannot serve as basis for a plea agreement.

Also in Germany, defence lawyers have both the right to launch themselves an investigation with a view to collecting additional evidence and the right to request from the prosecutor to collect exculpatory evidence; such requests are usually granted (Jenia I. Turner, Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons, William and Mary Law Review, Volume 57 (2015-2016), Issue 4, pages 1549 – 1560).

PART B:

CHALLENGING THE MODALITIES OF THE APPLICATION OF TRIAL WAIVERS IN ALBANIA

As it would be unrealistic to demand the abolition of trial waivers in general, it is submitted that the objective of any litigation or advocacy campaign should be to ensure the striking of an as equitable as possible balance between the defendant on the one hand and the prosecutors / courts on the other. To that end, the present section will outline a series of arguments that can be presented primarily in proceedings before domestic tribunals and concern mostly abbreviated trial proceedings, as they are by far the most prolific trial waiver mechanism in Albania.

That said, prospective litigators should bear the following consideration in mind. Challenging the current model of application of the two main trial waiver mechanisms will be a time-consuming and arduous process. It is very likely that lower instance courts will not be particularly receptive to arguments that essentially seek to modify long-standing judicial practice. As a result, it is rather certain that such arguments will initially meet with little, if any, success. This is to be expected as the judicial fora where the issues they raise can be fully addressed and which have the power to bring about a change in judicial practice are the High and the Constitutional Courts. It is therefore crucial to devise and implement a litigation strategy that will ensure that the following arguments are raised before all judicial instances and particularly before the latter two apex courts.

1. Make full use of the procedural means already available under Albanian law

As noted above, Article 327(4) CPC provides that, following the conclusion of the investigation, the defendant has the right to adduce evidence as well as request from the prosecutor the collection of additional evidence; moreover, under Article 110(2) CPC, should the prosecutor decide to reject such a request, he / she should issue a reasoned decision to that effect.

Even though in practice prosecutors do not respond at all to, let alone issue reasoned decisions rejecting such requests thus leading lawyers to refrain from filing them, it is submitted that a central plank of a litigation-

based campaign to render trial waiver proceedings more equitable should start from the filing of such requests, calling on the prosecutor to gather exculpatory evidence that can then be used as "leverage" in the context of the judgment upon agreement proceedings or lead to the defendant's acquittal in cases tried under the abbreviated trial procedure.

It is important however to stress to such requests should not merely set out ***what*** evidence should be collected (e.g. the testimony of an eyewitness) but should also clearly indicate ***why*** it should be collected by stressing how it can be crucial for the outcome of the trial or how it strengthens the defendant's position in the proceedings (e.g. that the eye-witness's testimony is crucial because it lends support to the defendant's argument that he was acting in self-defence and undermines the prosecution's account of the events to the effect that the defendant killed the victim in cold blood) (see by analogy, *Keskin v. the Netherlands*, no. 2205/16, 19 January 2021, §§ 42-43). It would then be up to the prosecutor to provide a reasoned answer as to whether the evidence requested is relevant and why its collection is not possible, while the court should review whether the failure to collect said evidence had a bearing on the overall fairness of the proceedings (*Keskin v. the Netherlands*, op. cit., § 43).

Admittedly, and in light of current prosecutorial practice, such requests are not likely to be granted or for reasoned decisions as to their rejection to be issued. This however cannot preclude defence counsel from highlighting the importance of these requests, informing the court that they were not granted and call upon the court (particularly in abbreviated trial proceedings) to review whether the information requested but not collected could influence the outcome of the proceedings. In other words, lawyers should not call upon the court to collect said evidence or dispute the validity of already collected evidence (as such a requests would lead the court to find that the defendant has withdrawn his / her request for an abbreviated trial (Article 405(7) CPC, thus losing the one-third reduction benefit) but rather request the trial court to take into consideration the importance, if any, of the evidence the collection of which that was requested but not carried out during the investigation stage of the proceedings.

Should nevertheless the court hold that this argument cannot be admitted without the defendant effectively withdrawing his request for trial under the abbreviated procedure, then defence lawyer can, on the basis of *Cani v. Albania* (no. 110066/06, 6 March 2012), consent to the continuation of the trial under the abbreviated trial without however this necessarily meaning, for exhaustion purposes, that the request was revoked. It is recalled that in *Cani v. Albania*, counsel for the applicant (who had requested to be tried under the abbreviated trial procedure) twice requested from the appeals court to secure the applicant's court attendance, something that should be to carry as he was already in prison. Nevertheless, both times the authorities failed to escort the applicant to the court. As a result, his lawyer agreed to the hearing taking place in the applicant's absence. Subsequently, the applicant also complained before the Constitutional Court that he was not allowed to attend the hearing before the Supreme Court, with the Constitutional Court rejecting his complaint finding that the grounds of appeal fell outside the scope of its jurisdiction.

Before the Court, the question arose whether the applicant lawyer's agreement for the hearing before the Appeals Court to continue in the applicant's absence constituted a waiver of his right to attend the appeals court hearing in person. The Court, after noting that the abbreviated trial procedure entails a reduction of the defendant's criminal procedural rights, observed that the defendant's appearance at his / her

trial is crucial in order to both respect his / her right to a hearing before a court and in order to ensure a fair trial (op. cit., § 49). The Court proceeded to note that even though the applicant had ultimately confessed during the abbreviated trial proceedings to the commission of the offence, he alleged that the domestic court had failed to take into consideration a series of mitigating factors that he would have presented to the courts, had he been allowed to attend the trial; indeed, for some of them (such as his expression of remorse over the commission of the crime) the domestic courts would need to directly assess his demeanour and conduct during the hearing in order to assess their veracity (*Mitchedlishvili v Georgia*, no. 894/12, 25 February 2021, § 38). In other words, the arguments he intended to present had a direct impact on the sentence he would receive and as a result attracted the protection afforded under Article 6 of the Convention (*Cani v. Albania*, op. cit., § 55). As a result, the failure of the authorities to ensure his presence was in violation of Article 6.

Recently in a case against Croatia, the Court seems to have endorsed the notion that, regardless of the defendant's confession, testimony as to the extent of his / her involvement in the commission of the crime should still be collected. Thus in the case of *Dodoja v. Croatia* (no. 53587/17, 24 June 2021 (not yet final) the applicant, in the context of ordinary proceedings, confessed to being part of an organised group buying and selling narcotic substances but disputed the extent of his involvement, noting that it had been intermittent. Nevertheless, according to a statement of one of his co-accused, the applicant's involvement had been more substantive and had spanned a considerable period of time. The problem that arose however was that the applicant's co-accused had in the meantime departed from Croatia and could not be located into order to be led before the court and be cross-examined at the hearing. As a result, in the absence of any other evidence and in light of the applicant's confession, the court attached significant emphasis of the applicant co-accused's police statement. Before the Court, the applicant claimed that at no stage of the proceedings did he have the opportunity of cross-examining his co-accused, and argued that while he had indeed participated in the sale of narcotics, his participation was limited.

While the Court did not find at fault the authorities for failing to ensure the applicant's co-accused's attendance at the trial, it did note that, despite the applicant's confession, his co-accused's testimony clearly carried significant weight and could clearly affect the applicant's position in the proceedings and ultimately the courts' verdict, in so far as it portrayed the applicant as a more important and active member of the criminal network, a feature of the case that could clearly have a bearing on his sentence (*Dodoja v. Croatia*, op. cit., § 41, 46). Furthermore, and even though the Court did not hold the domestic courts should not have taken it into consideration, it considered that the domestic court had failed to take adequate, if any, counter-balancing measures to ensure the applicant's right to a fair trial, who saw his sentence being increased on the basis of a testimony of a co-accused (who clearly had incentives to minimise the degree of his participation in the criminal enterprise) whom he had not managed to cross-examine. The fact that the applicant had been given the opportunity of presenting his case before the court did not constitute a sufficient safeguard in that respect (Ibid., §§ 46-47).

Concluding, and in relation to cases where the defendant is contemplating filing a request for trial under the abbreviated procedure, it is important for defence counsel to address concrete requests to the prosecutor regarding the collection of evidence; as seen above, said evidence can not only be exculpatory but also evidence that clarifies the extent of applicant's criminal liability and might have a bearing on the gravity of his / her sentence. Should the prosecutor turn them down,

defence counsel should bring this refusal to the attention of the trial court, not in order to request from the court the collection of additional evidence but rather in order to call on the court to assess whether the evidence that was not collected could lead to reasonable doubts as to applicant's guilt or could have a bearing on the extent of the defendant's criminal liability. Should the court consider this as an implicit request to gather additional evidence and call upon defence counsel to indicate whether the defendant would like to withdraw the request for a trial under the abbreviated procedure, defence counsel should respond that he / she withdraws her plea but would like the claim and the court's decision to be recorded in the hearing's minutes (see by analogy *Kaçiu and Kotorri v. Albania*, nos 33192/07 and 33194/07, 25 June 2013, § 13, 94-95). That way, he / she will be able to substantiate the claim that the argument was raised before the court and that the withdrawal of the request did not amount to a waiver insofar as the court should have *propio motu* examined whether the uncollected evidence could undermine the overall fairness of the proceedings – much like the court should have insisted on the personal attendance of the applicant in the *Cani v. Albania* case.

2. Invoke comparative-law based arguments with a view to establishing the non-existence of adequate safeguards in proceedings taking place under the abbreviated trial procedure in Albanian law

While there are numerous international good practices in the field of trial waiver mechanisms that can be referred to, it is maintained that it would be more beneficial to focus on developments in this field in neighbouring Italy. Indeed, a rather striking feature of the Albanian model of abbreviated trial is that although introduced in 1995 and modelled closely on the Italian one (*guidizio abbreviato*), it is not attended by a similar set of safeguards. Thus for example, defendants in Italy have the right to make their request for an abbreviated trial conditional upon the collection of additional evidence (*guidizio abbreviato conditionato*, Article 438(5) Italian CPC). It is important to note here that such a request would be filed directly with the preliminary hearing judge, rather than with the prosecutor, who will have to issue a reasoned decision rejected the request. Similarly, and in order to ensure that the benefits from an abbreviated trial are available to the defendant even after he requests the collection of additional evidence, it is possible to a request an "ordinary" abbreviated trial after the request for a conditional abbreviated has been turned down. Moreover, the preliminary hearing judge exercises both judicial and prosecutorial functions: he / she has the right to request *propio motu* the collection of additional evidence (Article 441(5) of the Italian CPC). Similarly, following a number of judgments rendered by the Italian Supreme Cassation Court, should appeals court seek to reverse acquittals rendered in abbreviated trial proceedings, they should first examine in person those witnesses whose written depositions were considered important during the trial at first instance and not merely really on their written depositions (Italian Supreme Cassation Court, Plenary Decision no. 14800, 2 April 2018). In its recent judgment in the case of *Di Martino and Molinari* v. Italy (nos 15931/15 and 16459/15, 25 March 2021), the Court seems to have placed emphasis on the existence of such safeguards in the context of abbreviated trial proceedings.

A related feature of the Italian criminal justice system is that of the competence of defence counsel to gather evidence during the investigation phase of a case. Thus under Articles 391-bis to 391-decies of the Italian CPC, defence counsels have

wide-ranging powers, almost on a par to the prosecutor, to carry out an investigation (so called "defence-investigation") with a view to securing evidence they can then use to the benefit of their principal. Thus lawyers can question witnesses as well as other suspects / co-accused persons (in the presence of their lawyers), as well as enter both public and private places with a view to collective evidence. Information and evidence gathered from such investigative acts is then included in the defence's dossier kept at the office of the preliminary hearing judge, a dossier to which the prosecutor also has access.

As it can be seen therefore, the Italian preliminary hearing judge will not have before him / her only the version of events put forward by the prosecutor but also that of the defendant, who will have expectedly collected exculpatory evidence or evidence mitigating his / her criminal liability and will therefore be in a position to reach a more informed and indeed, more equitable verdict.

None of these safeguards are available to defendants requesting an abbreviated trial in Albania, where the preliminary hearing judge's role seems to be more to carry out a cursory review of the case-file that will more often than not contain almost exclusively inculpatory material and merely record the defendant's answer to the question whether he / she is requesting a trial under the abbreviated trial procedure rather than play an active role in the proceedings and ensure respect for the defendant's right to a fair trial. Similarly, the role of defence counsel in Albania is particularly limited as he / she can merely address requests for the collection of additional evidence to the prosecutor, requests that are usually implicitly rejected.

It is suggested that, particularly before the two Albanian apex courts, defence counsels should present a comparison between the two abbreviated trial models as adopted in Italy and Albania as well as other structural differences between the two legal system that are of relevance to trial waiver proceedings (such as the role and competence of defence counsel) and call upon these two courts to critically assess whether the modalities of the application of the abbreviated trial process in Albania strike a fair balance between the need to ensure a swift administration of justice on the one hand and the need to respect the defendant's right to a fair trial on the other.

3. Address counter-arguments based on the restrictive approach to trial waivers adopted by the European Court of Human Rights

Any litigation-based strategy will have to address sooner or later the fact that the European Court of Human Rights' (the Court) approach to trial waivers and in particular towards the abbreviated trial procedure is rather accommodating. Thus the Court has held that Article 6 of the Convention does not preclude a defendant from waiving some of his / procedural rights, as long as such a waiver is established in an unequivocal manner, not run counter to an important public interest and be attended by minimum safeguards commensurate with its importance (*Hermi v. Italy* [GC], no 18114/02, 18 October 2006, § 73). On the basis of these three elements, the Court has endorsed the Albanian abbreviated trial model in *Cani v. Albania* and the Italian one in *Kwiatowska v. Italy* (dec.) (no. 52868/99, 30 November 2000) and a number of other cases.

More importantly however, the Court appears to have endorsed the application of a trial waiver and found it in compliance with Article 6 in the context of a case which would appear to constitute a textbook case

study of coerced negotiated justice. Thus in the case of *Natsvlishvili and Togonidze v. Georgia* (no. 9043/05, 29 April 2014),[18] the two applicants held shares in a public company of which the first applicant was also the managing director, He was charged with various company-law offences and placed in pre-trial detention. Upon his initiative, an agreement was reached between his defence counsels and the prosecution according to which the defendant, even though he still maintained his innocence, would not contest the charges and would reimburse the state for the losses it incurred (earlier he and his wife had transferred to the state the share to the public company they held, free of charge) and had made another payment to the state as a form of a fee for the conclusion of the agreement. For his part, the prosecutor undertook to request from the trial court to find him guilty without an examination of the merits of the case and impose, instead of a prison sentence, a fine. The trial court, after hearing the defendant and taking note that he still maintained his innocence, found him guilty as charged. Noting that he had consented to the terms of the plea agreement and that he had voluntarily returned the money he embezzled to the state, it then sentenced him to the payment of a fine. At the time it was issued, the decision was not subject to appeal, such a possibility being introduced subsequently.

The first applicant filed an application with the Court, arguing that his right to a fair trial had been violated due to the way the plea-agreement procedure was applied in his case. Nor was he the only one the harbour doubts as to the method of application of the procedure in Georgia; different Council of Europe bodies such as the Commissioner For Human Rights and the Council's Parliamentary Assembly had expressed their concerns for the modalities surrounding the application of the plea-agreements procedure. More specifically, they were critical of the wide discretionary powers of the prosecutor the limited judicial oversight of such agreements and the courts' overreliance on the evidence as presented by prosecutor, as well as the taxation character of the fines imposed following such agreements, which funds from such fines being diverted to cover other needs such as the payment of pensions. They also noted that due to the extremely high rate of conviction, it was quite possible that defendants felt constrained to opt for a plea agreement in order to make the best out of a bad situation. Similarly, instead seeking to ensure that their principals benefit from a fair trial lawyers often advised them to strike an agreement with the prosecutor as quickly as possible. Moreover, according to a report by Transparency International and on the basis of official statistics, courts almost always endorsed plea-agreements, with only 8 out of 8,770 requests for approving a plea-agreement being turned down in 2008, a percentage of less than 0.1%. Similarly and extremely low were the acquittal rates, ranging from 0,7% in 2005 to 0,1% between 2007-2009, leading Transparency International to note that with such conviction rates, prosecutors can easily impose the terms of the plea-agreement, knowing that if the defendant disagrees, he / she will have to undergo a lengthy trial process that will still almost certainly lead to conviction (*Natsvlishvili and Togonidze v. Georgia*, op. cit., §§ 55-61). As if the above were not enough, before he

18 The main parts of the judgment are available in Albanian at the Court's website https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22%22CASE%20OF%20NATSVLISHVILI%20AND%20TOGONIDZE%20v.%20GEORGIA%20-%20[Albanian%20Translation]%20by%20the%20COE%20Human%20Rights%20Trust%20Fund%22%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-15

agreed to the plea-agreement, the applicant was for some period detained on remand in the same poorly equipped cell with the person who had kidnapped and ill-treated him in the past.

Nevertheless none of the above elements on its own or collectively could, in the Court's opinion, amount to a violation of Article 6, with the Court attaching weight to the following considerations. First, the fact that it was the applicant who requested the plea-agreement and expressed his willingness to restore the funds he allegedly embezzled to the state. Second, he was granted full access to the case file. Third, during the plea-agreement he was assisted by two privately retained lawyers. Fourth, he was asked repeatedly by both the prosecutor and the trial court whether he entered into the plea agreement of his own free will and whether he fully understood its terms, to which he always answered in the affirmative. Fifth, a written record of the agreement was drawn up and submitted to the court for review. Sixth, the court had the competence of rejecting the plea-agreement if it considered it inequitable or could lower the sentence recommended by the prosecutor, Seventh, the court examined and approved the plea-agreement in a public hearing. The above elements led the Court to hold that the applicant had freely agreed to waive his right to an appeal by entering into the plea agreement and that furthermore his decision to do so was "undoubtedly conscious and voluntary", was attended by a minimum level of safeguards and did not run counter to any public interest (Natsvlishvili and Togonidze v. Georgia, op. cit., §§ 93-97, 97).

As it can be seen, the challenges the applicants faced in *Natsvlishvili and Togonidze v. Georgia* was similar to the one defendants in Albania are facing. Confronted with an almost certain conviction and without the means of presenting an effective defence, there is no need for the authorities to put any kind of pressure on defendants to request or agree to a trial waiver, as the defendants themselves will "voluntarily" consent to a trial waiver in order to at least ensure some benefits.

The question that therefore arises is the following: if the Court has endorsed the plea agreement both in principle in a number of cases against Italy and Albania and in relation to a case with facts as extreme as the ones in *Natsvlishvili and Togonidze v. Georgia*, what is the likelihood of success (or indeed, the point) of litigation before domestic courts which can quite easily dispose of the challenge merely by citing the Court's decisions?

The answer to this question is threefold.

First, and regarding Albania, it is recalled that the differences between the two abbreviated trial procedures are significant. The objective of litigation before Albanian courts should not be to challenge the very institution of abbreviated trial but rather to highlight these differences and demonstrate their impact on the defendant's criminal procedural rights and suggest improvements along the lines of the Italian model, in the hope that one of the two apex courts will share these concerns. It is reminded that although the Court endorsed the Albanian abbreviated trial model in *Cani v. Albania*, it did so only in principle and did subject its application to close scrutiny, holding that the failure of the authorities to ensure the applicant's court attendance was in violation of Article 6 and effectively holding that the defendant should always be heard. It is submitted that the Court would be receptive to arguments raising concerns regarding similar structural shortcomings, such as the impossibility of adducing, either directly or by petitioning the prosecutor, exculpatory evidence, in the context of abbreviated trial proceedings.

Second, other international judicial tribunals have adopted a more critical approach towards plea agreements. While a not directly comparable case, it is worth noting that the United Nations Human Rights Committee (U.N. HRC) struck down a plea agreement entered by an Australian national arrested by U.S. forces in Afghanistan on terrorism charges and who was detained in the Guantanamo Bay detention camp in Cuba; under the terms of the plea agreement, the applicant pled guilty in return for a reduced sentence part of which would be served in Australia. Upon returning to Australia, he challenged the part of the sentence that under the terms of the plea agreement he had to serve in Australia, arguing that in light of the numerous blatant procedural violations in the plea agreement as well as his ill-treatment and the detention conditions in Guantanamo Bay, his agreement was effectively coerced; the U.N. HRC agreed, noting that "… in order to escape the violations to which he was subjected, the author had no other choice than to accept the terms of the plea agreement that was put to him."[19] Reference to this case, as well as similar cases handed down by national supreme courts, could be made in order to demonstrate that the Court's approach in *Natsvlishvili and Togonidze v. Georgia* is not shared by other international or national courts; indeed, one of the Court judges entered a partly dissenting opinion in which she argued that in view of his certain conviction given the 0,4% acquittal rate at the time, the applicant could not have been expected to have opted for an ordinary trial (ibid., § 4 of the partly dissenting opinion by Judge Gyulumyan).

Third, the strategic litigation case should be chosen carefully in order to ensure that not only concerns about the trial's outcome but also other social or financial considerations had a bearing on the defendant's request to request a trial waiver. As noted in a recent insightful scholarly article on waivers of trial rights on the motivation of defendants in accepting trial waivers,[20] the Court had adopted a different approach in a case prior to *Natsvlishvili and Togonidze v. Georgia*, namely that of *Deweer v Belgium* (no. 6903/75, 27 February 1980). In that case, the applicant owed a butcher's shop and was charged with selling his products at a higher price than that allowed by law. As a result, he was presented with the option of either pleading guilty to the charge and paying a fine or defending himself in criminal proceedings, during which his shop would be closed. Rather understandably, he opted for the former. Before the Court he argued that the reason why he pled guilty was his concern about being deprived of his livelihood in case he contested the charge before the court. The Court agreed, noting that while the Convention did not preclude rights waivers, in the instant case the main motivation behind the applicant's decision to agree to the waiver was the economic loss he would sustain by closing, even temporarily, his business (ibid., § 51(b)). Moreover, it did not appear as if he did not stand any chances of an acquittal; as also noted by the Court, in many similar cases the defendants had been found not guilty (ibid). In other words, the applicant agreed to the plea-agreement not because he considered his conviction certain and wanted to minimise his losses but on the contrary, because he stood good chances of being acquitted after however a lengthy trial, with his shop closed down and without having the possibility of

19 U.N. HRC, Communication No. 2005/2010, Hicks v. Australia, 5 November 2015, CCPR/C/115/D/2005/2010, paragraph 4.9.

20 Rebecca K. Helm, *Constrained Waiver of Trial Rights? Incentives to Plead Guilty and the Right to a Fair Trial*, Journal of Law and Society, Vol. 46, Issue 3, pp. 423-447, 2019

requesting compensation for his financial losses from the state (ibid., § 52). The Court also commented on the disproportionality of the "incentives" offered to the applicant: one the one hand, agreeing to pay the fine would set him back 10,000 Belgian Francs (roughly 250 EUR at present prices – it is recalled the case dates back to 1980) while challenging the charge would cost him definitely far more than that (ibid., § 51(b)). Adopting a particularly interesting reasoning, the Court turned on its head the Government's argument to the effect that the fine was rather modest in nature (and indeed, the minimum fee was 3,000 Belgian Francs), noting that it was this very "flagrant disparity" between the low fine on the one hand and the grave financial repercussions the applicant would face if his shop was closed down that explained his decision to accept the plea agreement, with the Court noting that this disparity "…rendered the pressure so compelling that it should come as no surprise that the applicant succumbed to it" (ibid., § 51(b)). As a result, the applicant's waiver of his right to a fair trial was tainted by constraint, in violation of Article 6 of the Convention. Rather interestingly, the *Deweer v. Belgium* case is not cited by the Court in *Natsvlishvili and Togonidze v. Georgia* judgment.

It is submitted that the Court's approach in *Deweer v Belgium* is the correct one; nevertheless considering that *Natsvlishvili and Togonidze v. Georgia* judgment is considered to be the authority on plea-bargain cases, it is crucial to highlight which are the aspects of *Deweer* that can be accommodated in the Court's approach as set out in *Natsvlishvili*. It is clear for example that, unlike it did in *Deweer*, the Court post-*Natsvlishvili* will not take into consideration the overall acquittal / conviction rates as it does not consider them as having a bearing on a defendant's decision-making process as to whether to request or agree to a trial waiver. At the same time however, in *Natsvlishvili*, the applicant (understandably) did not complain that his decision to accept the plea agreement was motivated by considerations other than the outcome of the trial, no matter how preordained it might have been. The applicant's complaint before the Court in *Deweer* however was not that he acted the way he did out of concern for the outcome of his trial (indeed, there was evidence suggesting that he stood good chances of being acquitted) but out of concern of the impact that not consenting to the plea-agreement would have on his professional life.[21] According to Ms Helm, a law professor at the University of Exeter who has studied and written extensively on the impact of psychological and social pressures on defendants and their decision-making processes, there are three elements that ought to be cumulatively examined in order to ascertain whether a trial waiver is voluntary. First, whether the incentive makes it unreasonable to expect the defendant to reject the trial waiver. Second, whether the incentive is independent of the outcome of the trial and third whether it was the incentive that caused the applicant to plead guilty, since if the defendant did not agree to the trial waiver due to the incentive but for some other reason, it was not the incentive that influenced the defendant's choice as to whether to accept the trial waiver.[22]

Translating the above into practice, and in order to prevent the automatic application of *Natsvlishvili and Togonidze v. Georgia* by the domestic courts in a strategic litigation case, it is important to select a case where, in addition to the criminal sanction, ancillary ones that have an impact on the defendant's possibility to earn his / her livelihood are also imposed. In other words, a case should be chosen where the repercussions in the defendant's life that not opting for the trial

21 Ibid., page 432.
22 Ibid., page 434.

waiver would entail (e.g. the suspension of his professional drivers' license for a longer period of time) clearly outweigh the benefits from the criminal proceedings (in the form of reduced sentence or a swift conclusion of the proceedings). It could then be argued that the defendant opted from the trial waiver not because of the (real or perceived) benefits in the proceedings against him it entailed but rather in order to minimise the collateral damage that going for an ordinary trial would have in his / her personal and family life, an line of argumentation not raised by the applicant in *Natsvlishvili and Togonidze v. Georgia.*

PART C: RECOMMENDATIONS TOWARDS ENSURING A BETTER BARGAIN FOR ALL

1. Collect and disseminate more comprehensive statistics regarding trial waivers

One of the biggest challenges that Res Publica faced when carrying out research on trial waivers in Albania was the absence of high quality statistics. Even though collating information from different sources can give a more or less accurate picture of how often trial waivers are applied and what are their outcomes, there is no substitute for official statistics. Courts administration should therefore collect statistics disaggregated by:

- court,
- age, gender, nationality or ethnic origin of the defendant
- type of crime,
- type of procedure (e.g. abbreviated trial / judgment upon agreement / ordinary trial)
- length of proceedings per type of procedure
- median sentence by type of crime per procedure and by age, nationality or ethnic origin of the defendant
- percentage of cases where the courts refused to endorse a judgment upon agreement / transferred a case from the abbreviated trial procedure to the ordinary procedure, as well as their reasons for holding so.
- percentage of cases where persons who had pleaded guilty were eventually found innocent, to assess and address risks of miscarriage of justice.

Similarly, the General Prosecutor's Office should collect disaggregated statistics by:

- prosecutor's office
- age, gender, nationality or ethnic origin of the defendant
- type of crime
- type of procedure followed after the conclusion of the preliminary investigation (judgment upon agreement / abbreviated trial / ordinary trial)
- length of proceedings per type of procedure
- median sentence proposed by the prosecutor and upheld by the court in judgments upon agreement by age, nationality or ethnic origin of the defendant

Such statistics would only allow policy makers and researchers to identify emerging trends but could also serve as tools for appraising the performance of judges / prosecutors. Thus a prosecutor who disposes most of his / her cases by means of judgments upon agreement or a judge who almost invariably upholds such agreements should be subject to a performance evaluation.

Good practice

In the United States, the Sentencing Commission collects data from sentencing courts with regard to every felony and class A misdemeanours. Within 30 days of entry of judgment in criminal cases, courts submit a report to the Commission, which contains the charging document, the plea agreement, the presentence report, the judgment and the written statement of reasons. Data is extracted from these documents and analysed to the attention of policymakers and the federal criminal justice community. They collect and analyse the number of cases dealt with by criminal courts each year, the demographic background of people who were sentenced and the type of offenses that were dealt with. More particularly, data is collected on the percentage of cases in which people pleaded guilty or went through a full trial and on the percentage of guilty pleas by type of crimes.

In the United Kingdom, the Ministry of Justice collects and publishes quarterly statistics on caseload and timeliness in Magistrate's Courts and Crown Courts. Data is also collected on guilty plea rates with and allows comparison of average duration between cases where defendants pleaded guilty or not. Data is also gathered to compare guilty plea rates between different demographic groups (men/women, White, Black, Asians and other), to determine the stage at which guilty pleas were entered an accepted, and the average custodial sentence lengths for people who pleaded guilty or not.

In Finland, where trial waivers take place in open court, the subsequent judgment indicates what the sentence would have been if the conviction had occurred following a full trial rather than because of a trial waiver.

2. Make judgments upon agreement more transparent

According to research by Res Publica, while the sentences asked for by prosecutors in the context of judgments upon agreement are usually significantly lower than the ones imposed by courts in similar cases, this is not the case in relation to a limited number of offences (e.g. not complying with a police order) where the sentences sought by prosecutors (and more often than not endorsed by the courts) are significantly higher than the ones imposed by courts under ordinary trial proceedings. No reasons have been advanced for this discrepancy which is apparently due to institutional reasons, namely the close relationship between the police and the prosecutor's office, leading the latter to regarding any offence against the former as particularly serious.

While Res Publica does not necessarily advocate for a solution along the lines of the Italian model of plea-bargain (*applicazione della pena su richiesta delle parti*, known colloquially as *pattegiamento sulla pena* or simply *pattegiamento*) in which the sentence reduction the prosecutor can agree to is limited to up to one-third (Article 444 of the Italian CPC), it finds problematic the unfettered discretion of the prosecutor in deciding which crimes merit a significant sentence reduction and which not. Moreover, such discretion also creates concerns as to whether the prosecution's decision as to the sentence reduction he / she will offer, might be influenced by other consideration, such as the identity of the defendant or his / her perceived culpability by the prosecutor.

To that end, Res Publica recommends that the High Prosecutorial Council adopts guidelines setting out the range of discounts that are permissible, as well as providing that departure from these lower and upper thresholds are possible subject however to the prosecutor providing convincing grounds (to be reviewed by the court) as to why such a departure is called for in that particular case. Equally importantly, the guidelines should draw the prosecutors' attention to the imperative need to not make any offer for a judgment upon agreement before collecting enough material that attests *prima facie* to the defendant's culpability. Moreover the guidelines should draw the prosecutors" attention to the need to respond to reasoned requests for the collection of additional evidence.

Good practice

In Slovenia, General Instructions of the Supreme Public Prosecutors' Office regarding negotiations and proposing sanctions in cases of admission of guilt agreements, were released in 2012. These prescribe the basic premise for proposing criminal sanctions. For example, it states that the starting point for the amount of the proposed criminal sanction must be largely in accordance with the sanctions imposed by the courts and the objective and subjective circumstances of the criminal offense; that the proposed sentence should not be less than two-thirds of the sentence imposed by the court in a similar case.

In France, the Ministry of Justice published a Circular on the acknowledgment of guilt procedure in 2004. It provides that acknowledgment of guilt procedure should only apply to cases which are ready for trial, meaning cases which could have been immediately referred to the tribunal without need for further investigation or instruction; and that the offence must be relatively simple, allow a precise assessment of its seriousness without need for lengthy debates. It also requires some predictability of the sanction the criminal court would decide, so that the defendant is able to knowingly assess the adequacy of the penalties offered by the prosecutor.

3. Take advantage of existing good practice and implement measures towards establishing a more level playing field between defendants and their lawyers, prosecutors and judges

Res Publica finds particularly problematic the imbalance of power between the various actors, an issue however that affects not only proceedings taking place under the different trial waiver mechanisms but judicial proceedings in general. As a result, a more comprehensive approach is needed, one that calls for a substantial amendment of the Criminal Procedure Code.

Fortunately the legislature not have to look too far for potential good practices. In light of the numerous elements that have been borrowed directly from the Italian criminal justice system, it is important to undertake an in-depth comparative study of the two systems with a view to identifying which further elements can be introduced in the Albanian legal order. Res Publica considers it crucial in this respect that the scope of powers of the defence counsel be widened, so he can take a more active part in criminal investigations, act as a counterweight to the prosecutor, and ensure that exculpatory or mitigating evidence is collected and presented to the court.

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